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Administrative Determinations and the Extraordinary Writs in the State of Washington [Part 2]

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ADMINISTRATIVE DETERMINATIONS AND THE EXTRAORDINARY WRITS IN THE STATE OF WASHINGTON

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(Continued from January)

QUO WARRANTO

The function of the information in the nature of quo warranto, so far as it bears upon acts of administrative tribunals, may be seen in the following statutes:

> REM. REV. STAT. § 1034. An information may be filed against any person or corporation in the following cases:
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> 1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office or franchise within the state, or any office in any corporation created by the authority of the state;
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> 2. When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office . . . .
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> Section 1043. Whenever any defendant shall be found guilty of any unsurpation of or intrusion into or unlawfully exercising any office or franchise within this state, or any office in any corporation created by the authority of this state, or when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law shall work a forfeiture of his office . . . the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office, franchise, or corporate rights, . . . and the court shall adjudge costs in favor of the plaintiff.

The statutes[94] governing the proceeding have remained unaltered, except for minor changes, since first enacted as territorial laws in 1854.

The historical development, theory, and practice concerning the information in Washington were the subject of a comprehensive article in this REVIEW five years ago.[95] The statutory proceeding is related to the ancient writ of quo warranto and to the common law information in the nature of quo warranto. More particularly does it have relation to the latter, as modified by English legislation in 1710. The Washington Constitution gives the supreme court "original jurisdiction in . . . quo

[94] REM. REV. STAT. §§ 1034-1048. *Cf.* Laws 1854, pp. 216-218. Section 1047 should be noticed as authorizing prosecution of the information "for the purpose of annulling or vacating any letters patent, certificate, or deed granted by the proper authorities of this state when there is reason to believe the same were obtained by fraud, or through mistake or ignorance of a material fact, or when the patentee or those claiming under him have done or omitted an act in violation of the terms on which the letters, deeds or certificates were granted, or have by any other means forfeited the interests acquired under the same."

[95] Orloff, *Information in the Nature of Quo Warranto in the State of Washington*, 15 WASH. L. REV. 165 (1940).

warranto . . . as to all state officers" and empowers the superior courts to issue "*writs* of . . . quo warranto."[96] A technical question may be raised whether or not the supreme court, or the superior courts, or both, are limited to issuance of the common law writ, as distinguished from the information. But the terms "writ" and "information" have been used loosely and interchangeably in modern times, and the courts undoubtedlyly have all the jurisdiction exercised at common law under the writ and information. The statute seems to govern the proceeding both in the supreme and superior courts, and this is proper because it embodies in substance the common law (as modified by early English legislation).

Quo warranto has been used largely in election contests, cases of removal from office, and in disputes over civil service employment. The proceeding is one in which both questions of law and of fact may be decided. The litigants have no right to a jury trial,[97] and the judge, in proper cases, has full power to make findings of fact.

According to REM. REV. STAT. Section 1014, mandamus may issue "to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded." From this language one may conclude that the writs of mandamus and quo warranto overlap. The Washington court has made the following pronouncement concerning the functions of the two writs:

> "This court has many times held that, wherever the title to an office, or the right to it, is involved, and where it is necessary to determine from facts outside the pleadings as to who is entitled to the office, mandamus is not the proper remedy, but that the person claiming the office must resort to quo warranto. . . .
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> "There are at least two Washington cases holding mandamus to be the proper remedy to restore civil service employees to their positions where it is claimed that they have been improperly removed. . . . The only means by which these apparently irreconcilable creatures can be turned into one cage where they will lie in cordial intercourse, without dealing a death blow to one or the other species, is to reconcile them by holding that mandamus is the remedy by which to reacquire a position of an employee, while quo warranto is the remedy by which to determine the right or title to an office by an official."[98]

The rule that title to an office, other than one under civil service regulation, must be tried in quo warranto proceedings applies whether a

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[96] Art. IV, §§ 4, 6. Italics supplied

[97] State v. Doherty, 16 Wash. 382, 47 Pac. 958 (1897); State v. Fawcett, 17 Wash. 188, 49 Pac. 346 (1897).

[98] State v. Otis, 131 Wash. 455, 459, 230 Pac. 414, 415, 416 (1924).

question of law or of fact is involved.[99] An early case[100] granting mandamus may be distinguished (if, indeed, it is not overruled) in that the mayor and council were entirely without power to remove plaintiff and a simple question of law was involved. Mandamus is an appropriate remedy to try one's right to employment under a civil service law.[101] But quo warranto may also be used if the employment in question is an "office."[102] That is, the employment must be above that of common laborer, must be distinctly classified, and must be "permanent" in nature. Mandamus and quo warranto have a common function in trying title to an office under civil service. As to all other offices quo warranto must be used; mandamus must be used as to civil service jobs which are not offices.

In general, courts have no jurisdiction over election contests except in so far as specific provision therefor is made by statute.[103] But the statutory proceeding in quo warranto enables a contestant to challenge the right of another who has assumed an office. In many instances where special statutes providing for election contests in court have been held inapplicable, the statutory information has proved an adequate remedy. Where an election is challenged in quo warranto proceedings, a full trial of the facts and law is had.[104] The certification of the election board has been held to be at most only *prima facie* correct. The language of the quo warranto statute is regarded as giving plenary jurisdiction to the superior court to try

[99] Lynde v. Dibble, 19 Wash. 328, 53 Pac. 370 (1898); Kimball v. Olmsted, 20 Wash. 629, 56 Pac. 377 (1899); State v. Otis, *supra* note 98; State v. McLennan, 110 Wash. 16, 187 Pac. 408 (1920); State v. Sailors, 164 Wash. 211, 2 P.(2d) 725 (1931); Clarken v. Blomstrom, 174 Wash. 612, 26 P.(2d) 87 (1933); State v. Tollefson, 4 Wn.(2d) 194, 103 P.(2d) 36 (1940). *Cf.* State v. Cheetham, 19 Wash. 330, 53 Pac. 349 (1898); State v. Daggett, 28 Wash. 1, 68 Pac. 340 (1902); Smith v. Baughman, 194 Wash. 78, 76 P.(2d) 1022 (1938).

[100] State v. Mayor of City of Ballard, 10 Wash. 4, 38 Pac. 761 (1894).

[101] Cases cited notes 87-92, *supra*.

[102] State v. Smith, 19 Wash. 644, 54 Pac. 33 (1898) (flume tender); State v. Fassett, 69 Wash. 555, 125 Pac. 963 (1912) (construction foreman); Foster v. Hindley, 72 Wash. 657, 131 Pac. 197 (1913) (sanitary inspector); State v. Coates, 74 Wash. 35, 132 Pac. 727 (1913) ("substreet" or "crosswalk" foreman at $80 monthly); State v. City of Seattle, 88 Wash. 589, 153 Pac. 336 (1915) (furnace tender in garbage division not an "office").

[103] Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23 (1896); Whitten v. Silverman, 105 Wash. 238, 177 Pac. 737 (1919); Malinowski v. Tilley, 147 Wash. 405, 266 Pac. 166 (1928); Morris v. Board of County Com'rs, 195 Wash. 173, 80 P.(2d) 414 (1938); *cf.* State v. Fawcett and State v. Hamilton, *supra* note 104.

REM. REV. STAT. §§ 5366-5382 provide for election contests concerning county offices. See note 10, *supra*. An advantage of this statutory proceeding is that the right to an office may be decided prospectively. That is, it is not necessary that the office presently be intruded upon or usurped.

[104] State v. Morris, 14 Wash. 262, 44 Pac. 266 (1896); Fawcett v. Superior Court, 15 Wash. 342, 46 Pac. 389 (1896); State v. Fawcett, 17 Wash. 188, 49 Pac. 346 (1897); State v. Peter, 21 Wash. 243, 57 Pac. 814 (1899); State v. Hamilton, 118 Wash. 91, 202 Pac. 971 (1921); *see* Hart, *op. cit. supra*, note 42, p. 57, n. 5.

title to an office. Perhaps another reason for the readiness of the courts to try all questions is the convenience and ease with which all the evidence, consisting of ballots and other papers, may be brought into court. The determination of the election board is given little weight and is subject to re-trial in every respect.

Disputes over the appointment or removal of an officer have often been decided by means of the information. Legality of an appointment under a statute may be tried.[105] So also has legality of a removal been litigated. Where the removing officer has acted according to his statutory (or constitutional) authority, is vested with discretion, and the removed officer has no right to a hearing, no inquiry into the merits will be made.[106] Where the removing officer asserts that another has forfeited his office but is vested with no discretionary or adjudicating power, the merits, legal and factual, will be tried in quo warranto proceedings.[107]

Where removal of an officer may only take place after a hearing and finding of cause, may quo warranto be employed to review the merits? In *State v. Van Brocklin*[108] plaintiff was removed as member of the Seattle Board of Public Works by the mayor after notice and hearing. An action of quo warranto was instituted to review the sufficiency of the cause and evidence. On demurrer the supreme court held one reason for dismissal sufficient in law, the other insufficient, and remanded the case for trial. The principal question in the decision was whether or not plaintiff should have sought review by writ of certiorari. At the time, statutory certiorari had not been provided for, and the court declared that under the common law writ only questions of jurisdiction and legality of proceedings could be reviewed. Hence certiorari was an inadequate remedy so far as plaintiff was concerned, and quo warranto was proper.

Certainly it appears from the decision that errors of law in the removal of plaintiff could be corrected in quo warranto proceedings. But the decision is not explicit concerning the extent to which the factual findings of cause should be re-tried below. Perhaps the question of cause was tried anew. The language of the statute seems to authorize such a procedure. On the other hand, the trial court may only have heard the evidence to determine whether or not it was sufficient to sustain the mayor's finding of cause.

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[105] State v. Mills, 2 Wash. 566, 27 Pac. 560 (1891); State v. Doherty, 16 Wash. 382, 47 Pac. 958 (1897).

[106] State v. Burke, 8 Wash. 412, 36 Pac. 281 (1894); State v. McQuade, 12 Wash. 554, 41 Pac. 897 (1895); Kimball v. Olmsted, 20 Wash. 629, 56 Pac. 377 (1899); State v. Byrne, 31 Wash. 213, 71 Pac. 746 (1903); *see* State v. Cheetham, 19 Wash. 330, 53 Pac. 349 (1898).

[107] State v. Otis, 131 Wash. 455, 230 Pac. 414 (1924).

[108] 8 Wash. 557, 36 Pac. 495 (1894). *Accord:* State v. Kirkwood, 15 Wash. 298, 46 Pac. 331 (1896).

Today there is doubt that quo warranto would issue in the circumstances of the *Van Brocklin* case. The decision was based on the narrowness and inadequacy of the common law writ of certiorari, and that ground is largely wanting now. Statutory certiorari is far more searching in its review of the merits of a determination than was the common law writ. It does not afford a trial de novo, as possibly quo warranto would, but it does authorize a court to weigh the sufficiency and preponderance of evidence. Of significance is the fact that since statutory certiorari has been provided for, quo warranto has not been used to review the merits of a removal from office after hearing. Statutory certiorari has been recognized as the correct procedure to obtain court review of a judicial or quasi-judicial determination of an administrative tribunal.

On the other hand, argument may be made that the language of the statute gives a court plenary jurisdiction to try title to an office in quo warranto. Argument may be made that the removing officer's hearing is only ancillary and does not diminish the court's jurisdiction, unless statute expressly so provides. If the trial is de novo, from the plaintiff's standpoint the information is more satisfactory and "adequate" than statutory certiorari. If the trial is only on the sufficiency of the evidence supporting the removal, there is no advantage in the proceeding as compared with statutory certiorari.

Quo warranto does not seem to have been employed to test the merits of a discharge by a civil service commission. In mandamus cases, if plaintiff has had a fair hearing, the cause is not frivolous, and some competent evidence supports the removal, the commission's decision will not be disturbed. It is inconceivable that a different rule would prevail if quo warranto were used. A principal reason for the rule in mandamus cases is that a municipality could authorize discharges without cause, and the reason would operate as strongly in quo warranto proceedings.

The statutory information in the nature of quo warranto is an effective method for securing court review of certain special types of administrative determinations. Where plaintiff claims that he has won an election, the certification of a canvassing board is of little weight, and the law and facts will be tried anew. The right to a civil service "office," as a matter of law, may be litigated, but the factual merits of a discharge will probably not be tried. In cases of removal from other offices quo warranto will bring no relief where the removing officer has acted within his statutory (or constitutional) authority and the removed officer has no right to a hearing. Where the removed officer does have a right to a hearing, the function of the writ is not clear. Perhaps it may be used to try again the merits of the removal. Or possibly only questions of law and sufficiency of evidence may be reviewed.

PROHIBITION

The common law writ of prohibition issues to prevent a court or other tribunal exercising judicial functions from acting without or in excess of its jurisdiction.[109] In Washington the writ granted in the superior courts is defined by statute:

> REM. REV. STAT. § 1027. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

Section 1028 states that the writ may be issued "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." It is to be noticed that Section 1027 does not restrict prohibition to cases in which the tribunal, corporation, board, or person is performing a judicial function.

An excellent comparison of the common law and statutory writs in Washington has been made in *Winsor v. Bridges*.[110] The regents of the University of Washington petitioned the supreme court to prohibit the board of state land commissioners from selling or leasing certain university lands. The regents asserted exclusive power to lease and sell. The supreme court denied the writ, holding that the threatened acts of the board were administrative or executive and not judicial. The court declared that under Article IV, Section 4, of the state constitution it could only issue the common law writ of prohibition. This writ could issue against judicial or quasi-judicial acts but not against administrative, executive, or legislative acts. The superior courts also had jurisdiction to grant the writ, of which they could not be divested, but under Article IV, Section 6, of the constitution the legislature had power to extend the scope of the remedy. Thus, the enactment of 1895 providing for statutory prohibition was constitutional even though it authorized the grant of the writ against acts not judicial in nature. The discussion in the case concerning the jurisdiction of the supreme and superior courts and the power of the legislature to extend the scope of the remedy was equally applicable to the writs of certiorari, mandamus, quo warranto, and habeas corpus.

At the present time the common law (or constitutional) writ of prohibition is issued by the supreme court. The language of the constitution seems to require that the writ issue only in connection with appeals or revisions pending in the court, but this restriction has

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[109] *See* Freund, *op. cit. supra* note 42, p. 240; Hart, *op. cit. supra* note 42, pp. 484-486; Spelling, *op. cit. supra* note 42, §§ 1716-20, 1722-1726, 1744.

The statutes governing the writ in Washington are REM. REV. STAT. §§ 1027-1033 (Laws 1895, pp. 119, 120).

[110] 24 Wash. 540, 64 Pac. 780 (1901).

been rejected because it would cause the writ to be of rare utility.[111] Before 1895 the writ issued from the superior courts, but since then the statutory proceeding has been available.

Common law prohibition has been granted most frequently from the supreme court to the superior courts. That the purpose of the writ is to prevent a court from acting without or in excess of its jurisdiction is a statement repeatedly made and adhered to.[112] The early cases established that for the writ to issue plaintiff had to show that the inferior court was about to assume a jurisdiction it did not have, that the court still had something to do under the claim of jurisdiction, that it had refused an application for a ruling that it did not have jurisdiction, and that there was no other proper remedy. In numerous cases it has been held that, assuming the inferior court had jurisdiction, prohibition will not issue to correct errors of law or of fact.[113] These cases include many where the lower court was alleged to be proceeding in an erroneous manner. Errors of law or of fact or in proceeding, where there is no defect of jurisdiction, must be corrected on appeal or by writ of certiorari.

Even where a court acts without or in excess of jurisdiction, many decisions have said that prohibition will not be granted if the remedy by appeal is adequate.[114] Confusion has existed in the decisions as to the circumstances making appeal adequate or inadequate. It now appears that if, as a matter of law, a court has no jurisdiction over a subject-matter or has acquired no jurisdiction over the parties or an

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[111] State v. Superior Court, 15 Wash. 668, 47 Pac. 31 (1896); Winsor v. Bridges, *supra* note 110; State v. Taylor, 101 Wash. 148, 172 Pac. 217 (1918). The same may be said concerning the writ of certiorari.

[112] State v. Superior Court, 2 Wash. 9, 25 Pac. 1007 (1891); State v. Superior Court, 6 Wash. 112, 32 Pac. 1072 (1893); Harris v. Brooker, 8 Wash. 138, 35 Pac. 599 (1894); Clifford v. Parker, 13 Wash. 518, 43 Pac. 717 (1896); State v. Superior Court, 13 Wash. 638, 43 Pac. 877 (1896); State v. Clifford, 78 Wash., 555, 139 Pac. 650 (1914); State v. Superior Court, 86 Wash. 685, 151 Pac. 108 (1915); State v. Superior Court, 148 Wash. 24, 267 Pac. 775 (1928).

[113] State v. Jones, 2 Wash. 662, 27 Pac. 452 (1891); State v. Superior Court, 17 Wash. 12, 48 Pac. 741 (1897); State v. Benson, 21 Wash. 571, 58 Pac. 1066 (1899); State v. Superior Court, 32 Wash. 498, 73 Pac. 479 (1903); State v. Tallman, 38 Wash. 132, 80 Pac. 272 (1905); State v. Clifford, 78 Wash. 555, 139 Pac. 650 (1914); State v. Superior Court, 110 Wash. 255, 188 Pac. 391 (1920); State v. Walker, 148 Wash. 610, 270 Pac. 126 (1928); State v. Bell, 157 Wash. 279, 289 Pac. 25 (1930); State v. Superior Court, 159 Wash. 372, 293 Pac. 283 (1930).

[114] State v. Superior Court, 36 Wash. 566, 79 Pac. 29 (1905); State v. Superior Court, 40 Wash. 555, 82 Pac. 877 (1905); State v. Superior Court, 50 Wash. 650, 97 Pac. 778 (1908); State v. Superior Court, 67 Wash. 370, 121 Pac. 836 (1912); State. v. Superior Court, 73 Wash. 296, 131 Pac. 816 (1913); State v. Clifford, 78 Wash. 555, 139 Pac. 650 (1914); State v. Superior Court, 112 Wash. 501, 192 Pac. 937 (1920); State v. Superior Court, 135 Wash. 344, 237 Pac. 717 (1925); State v. Superior Court, 149 Wash. 50, 270 Pac. 128 (1928).

action, appeal is inadequate.[115] If prohibition were denied, petitioner would be compelled to expend time and money in trial and in having the proceedings nullified on appeal. If, however, jurisdiction depends on a fact and the court has power to hear evidence and to determine the existence of the fact, prohibition is not available, and errors must be corrected on appeal or by writ of certiorari.

In a number of instances the supreme court has assumed jurisdiction under the common law writ to decide whether or not an administrative body should be prohibited from proceeding in a cause.[116] The court has said:

> "When our constitution was adopted, the courts and text writers of this country generally held that the writ was to restrain the exercise of unauthorized judicial or quasi judicial power, and that the remedy might be invoked against any court, or body of persons, board, or officers assuming to exercise judicial or quasi judicial powers, although not strictly or technically a court. . . . Undoubtedly this is the function the writ is to perform under our constitution. The writ, as so understood, was to prohibit proceedings of a judicial nature, but not to prohibit merely administrative, executive, or ministerial acts. . . . If the court or organized body in the particular is acting only in an administrative or executive capacity, although in other matters it may exercise judicial powers, a writ of prohibition is not the proper remedy, however illegal such administrative or executive acts may be."[117]

From time to time the court has stated that prohibition will not issue against "administrative," "executive," "legislative," "discretionary," "ministerial," or "clerical" acts. The distinction between these acts and judicial or quasi-judicial acts has not always been clear. In a few cases where the supreme court has assumed jurisdiction one may doubt

[115] State v. Superior Court, 4 Wash. 655, 30 Pac. 1053 (1892); State v. Superior Court, 17 Wash. 54, 48 Pac. 733 (1897); State v. Superior Court, 76 Wash. 27, 135 Pac. 494 (1913); State v. Superior Court, 88 Wash. 612, 153 Pac. 315 (1915); State v. Superior Court, 97 Wash. 358, 166 Pac. 630 (1917); State v. Superior Court, 122 Wash. 555, 211 Pac. 764 (1922); State v. Superior Court, 144 Wash. 44, 257 Pac. 837 (1927); State v. Superior Court, 145 Wash. 532, 261 Pac. 97 (1927), reversing 144 Wash. 351, 258 Pac. 27 (1927); State v. Superior Court, 159 Wash. 335, 293 Pac. 986 (1930).

[116] State v. Bridges, 22 Wash. 98, 60 Pac. 66 (1900); State v. Board of State Land Comm'rs, 23 Wash. 700, 63 Pac. 532 (1901); Winsor v. Bridges, discussed at note 110, *supra;* State v. Ross, 39 Wash. 399. 81 Pac. 865 (1905); State v. Ross, 62 Wash. 82, 113 Pac. 273 (1911); State v. Hinkle, 130 Wash. 419, 227 Pac. 861 (1924); State v. Schaaf, 185 Wash. 354, 54 P.(2d) 1014 (1936). In State v. Taylor, 54 Wash. 150, 102 Pac. 1029 (1909), application to prohibit a superior court from appointing a water commissioner pursuant to statutory authority was denied because the court was not acting in a judicial or quasi-judicial capacity.

In the following cases the common law writ was sought in the superior court. State v. Prosser, 2 Wash. 530, 27 Pac. 550 (1891); State v. Prosser, 4 Wash. 816, 30 Pac. 734 (1892); Stimson Mill Co. v. Board of Harbor Comm'rs, 4 Wash. 6, 29 Pac. 938 (1892).

[117] State v. Board of State Land Comm'rs, *supra* note 116, 63 Pac., at p. 532.

that the administrative body exercised a judicial or quasi-judicial function.[118] In these cases, apparently, the question was not raised.

Where statutory prohibition has been sought against an administrative tribunal, the superior courts have not been troubled with the question whether or not judicial or quasi-judicial functions were being exercised. For the writ to issue the only requirement, apart from inadequacy of appeal, is that the tribunal be acting without or beyond its jurisdiction.[119] Statutory prohibition has been a useful device for testing the validity of legislation and the legality of acts about to be done by governmental officials.

It is entirely clear that neither common law nor statutory prohibition may be granted simply to correct errors of law or of fact in an administrative proceeding.[120] Assuming that a board has jurisdiction, errors in exercising its powers must be reviewed by appeal or by writ of certiorari. Sometimes a close question may arise whether an act is in excess of jurisdiction or is merely an erroneous exercise of acknowledged jurisdiction.

State v. Board of Education[121] illustrates a novel use of the writ of prohibition. Plaintiff was a superintendent of schools and was charged with misfeasance and malfeasance. The board of directors of the school district were about to try plaintiff on these charges. Plaintiff peti-

[118] State v. Howell, 70 Wash. 467, 126 Pac. 954 (1912) (writ granted); State v. Reeves, 196 Wash. 145, 82 P.(2d) 173 (1938) (writ denied).

[119] State v. Daniel, 17 Wash. 111, 49 Pac. 243 (1897); Pierce County v. Spike, 19 Wash. 652, 54 Pac. 41 (1898); State v. Hogg, 22 Wash. 646, 62 Pac. 143 (1900) (judicial function); State v. Kuykendall, 117 Wash. 415, 201 Pac. 778 (1921); State v. Denney, 150 Wash. 690, 274 Pac. 791 (1929) (judicial function); State v. Murray, 181 Wash. 27, 42 P.(2d) 429 (1935); State v. Pat Kelly, 186 Wash. 589, 59 P.(2d) 373 (1936); State v. Superior Court, 188 Wash. 19, 61 P.(2d) 143 (1936); State v. State Tax Commission, 189 Wash. 56, 63 P.(2d) 494 (1937) (judicial function).

[120] State v. Denney, State v. Hogg, *supra* note 119.

[121] 19 Wash. 8, 52 Pac. 317 (1898). A similar case is State v. Superior Court, 72 Wash. 444, 130 Pac. 747 (1913), in which plaintiff brought an action in the superior court "to review" an order of a board of school directors dismissing her as a teacher. Plaintiff alleged that the county superintendent was prejudiced against her and dominated the board; that she had no opportunity to answer the false charges brought against her; and that no record was kept of the proceedings before the board. Plaintiff had a statutory right to appeal to the county superintendent and then to the state superintendent. But the appeal procedure was alleged to be inadequate because the appeal to the state superintendent was on the record made before the county superintendent. Citing State v. Board of Education, the supreme court held that plaintiff's allegations stated a cause of action. The superior court "had jurisdiction to review the order of the board of directors and to determine whether the order was made with or without cause." The case is not altogether clear as to what the writ of certiorari accomplished. Apparently the board would have to certify its record for review by the court on the sufficiency and preponderance of evidence. If no record existed, or if plaintiff had no opportunity to defend herself before the board, the case would be remanded for a full, fair hearing. While the county superintendent was not prevented from having contact with the board, his dominating influence may have been weakened by the decision.

tioned for statutory prohibition to prevent one Wells from sitting as a member of the board. He alleged that Wells was an enemy of plaintiff, that he was biased, and that he had publicly declared that he would vote to remove plaintiff whatever the evidence might be. The supreme court held that the writ should issue. It relied upon a line of New York decisions holding that a biased member of a tribunal should be removed unless his absence would cause the tribunal to be unable to act. The principal decision is off the beaten track, unless it can be said that a prejudiced member of a board acts without or in excess of jurisdiction. Nevertheless, it is an important decision in pointing to a remedy against bias in an administrative body. It is authority that prohibition may be granted to prevent a prejudiced member of a board from sitting in judgment on a case, at least where the board will not thereby be rendered incapable of acting.

In general, the writ of prohibition has a narrow function in administrative law. The common law writ in Washington issues to prevent an administrative body, exercising judicial or quasi-judicial powers, from acting without or in excess of its jurisdiction. The statutory writ has the same function, but is not limited to acts of a judicial or quasi-judicial nature. Prohibition often serves the same purpose as injunction. Two points of distinction are that the former is an extraordinary remedy at law and does not issue against private persons. Neither the common law nor statutory writ is granted to review errors of law or of fact or in proceeding. Such errors must be corrected by appeal or by writ of certiorari. Prohibition will not issue where there is an adequate remedy by appeal, but this restriction has not figured prominently where an administrative board acts without or in excess of its jurisdiction. Finally, prohibition has been used in Washington to prevent a biased member of a board from participating in a determination.

HABEAS CORPUS

The writ of habeas corpus is of ancient origin and issues to inquire into the cause for a person's detention or imprisonment.[122] The petitioner may be the person detained or someone acting in his behalf. The writ is provided for by statute in Washington:

> REM. REV. STAT. § 1063. Every person restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.
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> Section 1074. The court or judge shall . . . proceed in a summary way to hear and determine the cause, and if no legal cause be shown for the restraint or for the continuation thereof, shall discharge the party.

Both the supreme and superior courts have jurisdiction to grant the

[122] *See* Freund, *op. cit. supra* note 42, pp. 240-242; Hart, *op. cit. supra* note 42, pp. 479-481; Spelling, *op. cit. supra* note 42, §§ 1151-1157.

writ,[123] and it has the same function in the appellate court as it does in the courts below. However, the supreme court issues the writ only where the case is one of public interest or there is no other adequate remedy.[124] One reason is that it is inexpedient for the court to try questions of fact.

In by far the majority of instances habeas corpus has been employed in criminal cases to test a court order or judgment leading to plaintiff's incarceration. From these cases has emerged the leading principle that, assuming the court had jurisdiction, habeas corpus may not be substituted for appeal procedures to correct errors of law or of fact.[125] However, if the court was completely without jurisdiction to pass judgment or to issue its order, the writ is a proper and efficient method to obtain plaintiff's freedom. The Washington practice is in accord with the general rule elsewhere in the United States.

Habeas corpus has been of limited utility in challenging administrative determinations because few of them lead to imprisonment. The cases which have arisen give some understanding of the role of the writ in administrative law in Washington. To be kept in mind is the principle that habeas corpus is not a substitute for appeal procedures.

In *Spencer v. Kees*[126] plaintiff was an inmate of the state penitentiary, having been convicted of murder. The governor pardoned him on the conditions that he remain under surveillance of a doctor and that he be cared for by relatives. On being apprised that the conditions had been breached, the governor cancelled the pardon, and plaintiff was taken in custody by the superintendent of the penitentiary. In habeas corpus proceedings the trial court put the burden of proof on the state, but judgment went against plaintiff nevertheless. The supreme court, after holding that the governor had power to grant conditional pardons, said:

> "If the appellant was entitled to a trial upon the allegation that he had violated the conditions of the pardon, the court granted that right to him in this proceeding and placed the burden upon the state to show that appellant had violated the terms of the pardon. It has been held that this may be done in cases of this kind."[127]

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[123] WASH CONST. Art. IV, §§ 4, 6; REM. REV. STAT § 1066.

[124] *Ex parte* Emch, 124 Wash. 401, 214 Pac. 1043 (1923).

[125] *Ex parte* Richard Williams, 1 Wash. Terr. 240 (1867); Steiner v. Nerton, 6 Wash. 23, 32 Pac. 1063 (1893); *In re* Nolan, 21 Wash. 395, 58 Pac. 222 (1899); *In re* Casey, 27 Wash. 686, 68 Pac. 185 (1902); *Ex parte* Newcomb, 56 Wash. 395, 105 Pac. 1042 (1909); *Ex parte* Herman, 79 Wash. 149, 139 Pac. 1083 (1914); *Ex parte* Parent, 112 Wash. 620, 192 Pac. 947 (1920); Thomas v. Phelan, 157 Wash. 471, 289 Pac. 51 (1930); *Ex parte* Cavitt, 170 Wash. 84, 15 P.(2d) 276 (1932). *Accord:* U. S. v. Hunt, 16 F. Supp. 285 (Dist. Ct. 1936). *See* Spelling, *op. cit. supra* note 42, §§ 1191, 1202, 1206-1208, 1215-1217.

[126] 47 Wash. 276, 91 Pac. 963 (1907).

[127] 47 Wash. at p. 282, 91 Pac. at p. 965.

All the cases cited were from other jurisdictions. In this expression the court did not commit itself to a rule making plaintiff entitled to a judicial trial on the issue of breach of conditions.

In *State v. Superior Court*[128] one Williams was arrested as a disorderly person. The city health commissioner found him infected with venereal disease and had him committed, pursuant to ordinance, to a hospital for treatment. Williams appealed to the state board of health and it affirmed the commissioner's action. Williams then sued out a writ of habeas corpus, alleging he did not have venereal disease, and the superior court ordered an examination by three physicians. The health commissioner sought a writ of prohibition to prevent the examination. The supreme court granted the writ, stating that it was "within the power of the Legislature, in dealing with the problems of public health, to make the determination of a fact by a properly constituted health officer final and binding upon the public as well as upon the courts."[129] Habeas corpus was ineffective to cause a re-trial of a fact issue clearly given to an administrative tribunal to determine.

Pellisier v. Reed[130] is a case in which plaintiff was sentenced to the state reformatory. The board of managers transferred him to the state penitentiary, and later he was conditionally paroled. Subsequently, he was convicted of burglary and sentenced again to the reformatory. Thereupon the superintendent of the penitentiary took him into custody for violation of his conditional parole. Plaintiff petitioned for writ of habeas corpus claiming that his original transfer to the penitentiary was unlawful. The supreme court held that the board of managers had statutory authority to make the transfer and refused the writ. The court went on to say that it did "not want to be understood as holding, for the present at least, that a prisoner could be denied the right of showing in an appropriate proceeding an abuse of discretion on the part of the board."[131]

Ex parte Canary[132] is a similar case in which plaintiff was convicted of grand larceny and sentenced to the women's industrial home and clinic. Later she was transferred to the state penitentiary, the officers of the home acting under a statute authorizing transfer in the case of any inmate "who shall appear . . . to be incorrigible, or whose presence in said institution is detrimental to its well-being." Plaintiff denied she was incorrigible or detrimental to the well-being of the industrial home, and sued out a writ of habeas corpus. The supreme court held that the fact issue raised by plaintiff, as well as the question of abuse of discretion, could not be tried in habeas corpus. Some form of pro-

[128] 103 Wash. 409, 174 Pac. 973 (1918).
[129] 174 Pac., at p. 979.
[130] 75 Wash. 201, 134 Pac. 813 (1913).
[131] 134 Pac., at p. 815.
[132] 116 Wash. 559, 200 Pac. 307 (1921).

ceeding for the correction of errors would have to be resorted to, and the court repeated what it had said in the *Pellisier* decision concerning abuse of discretion. It seems clear that, in the absence of statutory appeal, certiorari was plaintiff's remedy. Apparently the writ would afford relief only if the record disclosed abuse of discretion.

Habeas corpus is a proper procedure to secure release of one who has regained mental soundness after having been committed by a court to a public institution for the insane. In Washington plaintiff has the burden of proving by a preponderance of evidence (1) that he is sane, (2) that he is probably free from danger of relapse, (3) that he has applied for discharge, and (4) that the superintendent of the institution has arbitrarily refused to release him.[133] As a practical proposition arbitrary conduct is made out if plaintiff sustains the burden of proof on items (1),(2) and (3). The decisions indicate that the courts give considerable weight to the superintendent's determination and require a clear showing before plaintiff is granted his freedom.

These several cases furnish a basis for some generalizations concerning the function of habeas corpus in administrative law. If an administrative tribunal has jurisdiction to make a determination, the writ may not be used to correct errors of fact or of law. If, as a matter of law, the board has no jurisdiction to act, habeas corpus is an efficient method for securing plaintiff's freedom. For instance, if a board acts under unconstitutional legislation, the writ would seem to lie. In habeas corpus proceedings the courts exercise traditional care in deciding whether or not plaintiff is lawfully detained. But where a board is entrusted by valid statute with a determination resulting in a person's detention, the great probability is that the merits will not be reviewed under the writ. Statutory appeal or certiorari is the proper remedy.

INJUNCTION

Injunction is a writ or decree granted to prevent the doing of a wrongful act which would otherwise cause irreparable injury to property.[134] It is an extraordinary remedy issuing from a court of equitable jurisdiction. The threatened injury must be serious, actual, and impending, and there must be no adequate remedy at law. For present purposes this is a sufficient statement concerning the nature of the writ. However, volumes have been written about the principles governing injunction and the circumstances under which it has been granted.

[133] *Ex parte* Brown, 39 Wash. 160, 81 Pac. 552 (1905); State v. Clifford, 106 Wash. 16, 179 Pac. 90 (1919); *Ex parte* Rath, 143 Wash. 65, 254 Pac. 466 (1927); Soderquist v. Keller, 21 Wn.(2) 1, 149 P.(2d) 528 (1944); *see* REM. REV. STAT. § 1064. Where plaintiff has been acquitted of crime because of insanity and confined, to secure release on the ground of restoration of sanity plaintiff must resort to the statutory remedy, and habeas corpus is not available. State v. Superior Court, 159 Wash. 335, 293 Pac. 986 (1930).

[134] *See* Freund, *op. cit. supra* note 42, pp. 237-239; Hart, *op. cit. supra* note 42, pp. 458-461; POMEROY'S EQUITY JURISPRUDENCE (5th ed. 1941), §§ 216-220, 222, 1337, 1338, 1359, 1359a; Spelling, *op. cit. supra* note 42, §§ 1, 3, 4, 11-14, 18.

In Washington jurisdiction to issue injunction is vested in the superior courts.[135] Statutes have been passed regulating procedures in securing the writ.[136] But the substantive law of injunction has been left for judicial development.

In probably most cases where injunction is sought against a state officer, no adjudicating function or discretionary act is involved. Petitioner may complain of interpretation or application of a statute. Or he may challenge the constitutionality of legislation pursuant to which defendant officer is acting. In the suit questions of fact will be resolved. The court will try the merits, both legal and factual, as in an ordinary civil action. No weight will be given the officer's opinion or determination that he should act in a particular way.

To be distinguished from this type of case is that in which a state officer or tribunal is entrusted with discretion or has an adjudicating function. Special grounds must now appear for the grant of injunction. A common statement is that the determination must be fraudulent, arbitrary or capricious, or done without jurisdiction, before equity will act.[137] Washington decisions are in accord with this statement.

Where discretion is vested in an officer or tribunal, it will not be controlled by injunction, in the absence of fraud, or arbitrary or capricious conduct.[138] A court will not assume to decide that the officer or tribunal is acting unwisely and to substitute its own discretion. Findings by a board of county commissioners of unforeseen emergency and of necessity for exceeding statutory limitations on debt are to a high degree discretionary, and injunction has been denied.[139] Various determinations of a legislative and political nature are not subject to control in a court of equity.[140] In all these instances there has been

[135] WASH. CONST. ART. IV, § 6; REM. REV. STAT. § 718.

[136] REM. REV. STAT. §§ 718-739 (Laws 1854, pp. 152-154).

[137] See Hart, *op. cit. supra* note 42, p. 460; Pomeroy, *op. cit. supra* note 134, § 1345a.

[138] State v. Milligan, 3 Wash. 144, 28 Pac. 369 (1891); Times Publishing Co. v. City of Everett, 9 Wash. 518, 37 Pac. 695 (1894) (award of printing contract to bidder asking four times as much as competitor held abuse of discretion); Schlopp v. Forrest, 11 Wash. 640, 40 Pac. 133 (1895); Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915); Columbia River T. & L. Co. v. Com'rs of Diking Dist. No. 2, 108 Wash. 148, 183 Pac. 134 (1919); Biagini v. Shoemaker, 122 Wash. 204, 210 Pac. 193 (1922); State v. Renschler, 172 Wash. 223, 19 P.(2d) 931 (1933); State v. Superior Court, 15 Wn.(2d) 673, 131 P.(2d) 943 (1942).

[139] Rummens v. Evans, 168 Wash. 527, 13 P.(2d) 26 (1932); Kruesel v. Collin, 170 Wash. 233, 16 P.(2d) 442 (1932) (determination will not be reversed unless "evidence clearly preponderates against it, or it appears that the board acted arbitrarily or capriciously").

[140] Seattle Transfer Co. v. City of Seattle, 27 Wash. 520, 68 Pac. 90 (1902) (improvement of road); Ewing v. Seattle, 55 Wash. 229, 104 Pac. 259 (1909) (grant of franchise to operate street railway); Twichell v. City of Seattle, 106 Wash. 32, 179 Pac. 127 (1919) (purchase of street car system); State v. Superior Court, 120 Wash. 183, 206 Pac. 966 (1922) (grant of pool hall license); *see* Vincent v. City of Seattle, 115 Wash. 475, 197 Pac. 618, 619 (1921).

a realization that the officer or tribunal, and not the court, is the one entrusted with discretion. Within wide bounds the exercise of discretion cannot successfully be challenged.

County commissioners in canvassing the vote cast on the question of moving a county seat have an adjudicating function which is singularly free from judicial control. Neither questions of fact nor of law may be reviewed in the courts.[141] The primary reason is that the election is a political matter over which the superior court has no jurisdiction. However, if a sham canvass is proved, injunction will be granted until such time as a real one is had.[142] Further, if statutory requirements with respect to the number of persons petitioning for removal have not been met, jurisdiction to hold the election and to canvass the returns is lacking, and injunction may be obtained.[143]

In a few instances injunction has been employed in civil service cases. As a remedy it is no more effective than mandamus and is obtained with greater difficulty. Mandatory injunction has issued to compel compliance with civil service regulations and to restore plaintiff to his rightful position.[144] The writ was sought in one discharge case but was denied because the reason was not frivolous and was supported by some competent evidence.[145] Mandamus seems to be the preferable and more usual method for asserting one's rights under civil service.

In general, injunction will not issue to correct errors of law or of fact in administrative adjudications.[146] This is the converse of the statement that fraud, arbitrary or capricious action, or failure of jurisdiction are the bases for equitable relief in administrative law. In fact, most of the authority that injunction will not issue to review ordinary errors of law or of fact is to be found in cases where the court relies on one of these exceptional grounds for granting relief. By implication these special grounds exclude ordinary errors of law and fact as grounds for injunction. Ordinary errors must be corrected in appeal proceedings or by writ of certiorari. That injunction is not available to correct errors of fact is an extension of the rule that the writ will not issue to control an exercise of discretion.

It is to be observed that the role of injunction in administrative law is analogous to that of mandamus. One remedy is granted to

[141] Injunction denied; Parmeter v. Bourne, 8 Wash. 45, 35 Pac. 586 (1894); Heffner v. Board of Com'rs, 16 Wash. 273, 47 Pac. 430 (1896); Mann v. Wright, 81 Wash. 358, 142 Pac. 697 (1914).

[142] Krieschel v. Board of Com'rs, 12 Wash. 428, 41 Pac. 186 (1895).

[143] Rickey v. Williams, 8 Wash. 479, 36 Pac. 480 (1894).

[144] Easson v. City of Seattle, 32 Wash. 405, 73 Pac. 496 (1903) (civil service commission had no jurisdiction to remove plaintiff in absence of dismissal by his superior; questions as to appropriateness of remedy waived); Gilmur v. City of Seattle, 69 Wash. 289, 124 Pac. 919 (1912); Petley v. City of Tacoma, 127 Wash. 459, 221 Pac. 579 (1923).

[145] Price v. City of Seattle, 39 Wash. 376, 81 Pac. 847 (1905).

[146] Seattle Wharf Co. v. Callvert, 42 Wash. 390, 85 Pac. 16 (1906); Tuffts v. Kiffee, 97 Wash. 500, 166 Pac. 788 (1917); *see* State v. Superior Court, 120 Wash. 183, 206 Pac. 966, 967 (1922).

compel action, the other to prevent action, where an officer has no discretion and violates his statutory or constitutional duty. Neither writ issues to control an exercise of discretion, except in instances of clear abuse. Neither writ may ordinarily be employed to review findings of fact or application of law in an administrative adjudication. Where mandatory injunction is granted, the relief is often indistinguishable from that which mandamus would afford.

As in the case of mandamus, one cannot say with accuracy that injunction never issues to correct errors of law in administrative determinations. Indeed, the statement is probably less true of injunction than it is of mandamus. Beyond this, it appears in some instances that an equity court will review the factual merits of an administrative determination.

Tax assessments have been the subject-matter of a large group of cases in which injunction has been employed to secure judicial review of the merits of an administrative determination. Injunction has developed as the leading remedy in these cases because statutory appeal has not generally been available and because certiorari is inadequate.[147] The basis for relief has been fraud, a concept which has been materially broadened. If an assessment is so grossly inequitable or palpably excessive as to constitute actual or "constructive" fraud, injunction may be obtained. Within the doctrine of constructive fraud are unequal or discriminatory assessment, arbitrary assessment made without the exercise of judgment, valuation of property on a fundamentally wrong basis resulting in excessive assessment, and flagrantly excessive valuation unaccompanied by other improper conduct.[148] In granting relief on these grounds the court reviews the evidence, facts, and law entering into the assessor's determination. However, the trial is not conducted for the purpose of simply affording the taxpayer with a second valuation of his property.[149] Before the court will interfere, he must prove

[147] Between 1925 and 1931 provision was made for statutory appeal. REM. REV. STAT. § 11097. See text at notes 24 and 62, *supra*.

[148] Andrew v. King County, 1 Wash. 46, 23 Pac. 409 (1890); Benn v. Chehalis County, 11 Wash. 135, 39 Pac. 365 (1895); Knapp v. King County, 17 Wash. 567, 50 Pac. 480 (1897); Landes Estate Co. v. Clallam County, 19 Wash. 569, 53 Pac. 670 (1898); Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553 (1901); Savage v. Pierce County, 68 Wash. 623, 123 Pac. 1088 (1912); Stimson Timber Co. v. Mason County, 112 Wash. 603, 192 Pac. 994 (1920); Samish Gun Club v. Skagit County, 118 Wash. 578, 204 Pac. 181 (1922); Finch v. Grays Harbor County, 121 Wash. 486, 209 Pac. 833 (1922); Norpia Realty Corp. v. Thurston County, 131 Wash. 675, 231 Pac. 13 (1924); Willapa Elec. Co. v. Pacific County, 160 Wash. 412, 295 Pac. 152 (1931). The decisions are classified and discussed in Rupp, *The Doctrine of Constructive Fraud in the Washington Law of Taxation*, 12 WASH. L. REV. 205 (1937).

[149] Olympia Water Works v. Gelbach, 16 Wash. 482, 48 Pac. 251 (1897); Northern Pac. R. Co. v. Pierce County, 55 Wash. 108, 104 Pac. 178 (1909); Doty Lumber & Shingle Co. v. Lewis County, 60 Wash. 428, 111 Pac. 562 (1910); Adams County v. Scott, 117 Wash. 85, 200 Pac. 1112 (1921).

constructive fraud (or actual fraud) by a preponderance of clear and convincing evidence. Generally, he must prove that the assessment is grossly disproportionate or palpably excessive.

Legislation was passed in 1931 forbidding issuance of injunction "to restrain the collection of any tax . . . except . . . where the law under which the tax is imposed is void . . . (or) where the property upon which the tax is imposed is exempt from taxation."[150] After the collection process has begun, one must pay the tax levied under protest, specifying reasons, and then sue for the unlawful or excessive amounts paid. Exactly when the "collection" of a tax begins is not clear. An able writer in this REVIEW has concluded from analysis of the cases that to be on the safe side one should seek injunction before the State Board of Equalization has completed its work.[151] If plaintiff files suit in time, the doctrine of constructive fraud with all its potentialities is open to him. If he does not bring suit for injunction promptly enough, he may still assert the doctrine, but he must do so in an action for taxes paid under protest.

Where an administrative tribunal is without jurisdiction in making a determination, injunction may be obtained. A variety of decisions illustrates this principle. A taxing body acting pursuant to unconstitutional legislation or levying upon exempt property has no jurisdiction.[152] The statute prohibiting injunction against collection of taxes excepts from its scope cases of this type. Serious defects in proceedings leading up to an election on the question of annexing territory to a municipality are cause for injunction.[153] If the petition or notices are insufficient or if polling places are not established in accordance with statute, there is a failure of jurisdiction. The annexation of territory subjects property to new tax burdens and other restrictions, and the owners have a right that proceedings be initiated and followed through in a legal manner. While the election is recognized to be a political matter, the threat to property rights is basis for the intervention of equity.

Lack of proper notice or of a petition with a sufficient number of qualified signers has been cause for injunction against the formation of

[150] REM. REV. STAT. §§ 11315-1—11315-7 (Laws 1931, p. 201, amended, Laws 1939, p. 772).

[151] McAllister, *Taxpayers' Remedies—Washington Property Taxes*, 13 WASH. L. REV. 91, 115-121 (1938). *See also* Eldridge, *The Determination of Property Taxes in Washington*, 16 WASH. L. REV. 13, 33, 34 (1941).

[152] Phillips v. Thurston County, 35 Wash. 187, 76 Pac. 993 (1904) (exempt property); Seattle & P. S. Packing Co. v. Seattle, 51 Wash. 49, 97 Pac. 1093 (1908) (same); North American Lumber Co. v. City of Blaine, 89 Wash. 366, 154 Pac. 446 (1916) (same), earlier proceedings, 81 Wash. 13, 142 Pac. 438 (1914); Drum v. University Place Water Dist., 144 Wash. 585, 258 Pac. 505 (1927) (unconstitutional legislation).

[153] State v. Superior Court, 36 Wash. 566, 79 Pac. 29 (1905); State v. Nicoll, 40 Wash. 517, 82 Pac. 895 (1905); Amos Brown's Estate v. City of West Seattle, 43 Wash. 26, 85 Pac. 854 (1906); Wilton v. Pierce County, 61 Wash. 386, 112 Pac. 386 (1910).

a water or diking district, or against a special assessment for an improvement.[154] However, in a number of cases the doctrines of estoppel and waiver have defeated plaintiff's action where he acquiesced in the proceedings and led the assessing tribunal to believe he had no objection on jurisdictional grounds.[155] Several cases have arisen involving the construction, improvement, or vacation of a road. County commissioners have no authority to act unless the statutory number of adjacent property owners petition and proper notice is given.[156] A miscellany of decisions may be found in which an administrative determination is enjoined for lack of jurisdiction for reasons other than insufficiency of notice or petition.[157]

No simple rule can be stated as to what are jurisdictional matters and what are not.[158] A statute providing for proceedings leading up to an administrative determination affecting property rights modifies, or is in derogation of, the common law. Accordingly, the courts incline to strictness in requiring the administrative tribunal to pursue its lawful

[154] Buckley v. City of Tacoma, 9 Wash. 253, 37 Pac. 441 (1894); Barlow v. City of Tacoma, 12 Wash. 32, 40 Pac. 382 (1895); Wingate v. City of Tacoma, 13 Wash. 603, 43 Pac. 874 (1896); Ruffin v. Sewell, 134 Wash. 208, 235 Pac. 31 (1925); Drum v. University Place Water Dist., 144 Wash. 585, 258 Pac. 505 (1927) (statute failing to give property owners within district opportunity to object held unconstitutional); Desimone v. Shields, 152 Wash. 353, 277 Pac. 829 (1929).

[155] Barlow v. City of Tacoma, 12 Wash. 32, 40 Pac. 382 (1895); Wingate v. City of Tacoma, 13 Wash. 603, 43 Pac. 874; Rucker Bros. v. City of Everett, 66 Wash. 366, 119 Pac. 807 (1911); Desimone v. Shields, 152 Wash. 353, 277 Pac. 829 (1929).

[156] Megrath v. Nickerson, 24 Wash. 235, 64 Pac. 163 (1901); Carlson v. Kitsap County, 124 Wash. 555, 213 Pac. 930 (1923) (but plaintiff held to have waived defects); Elsensohn v. Garfield County, 132 Wash. 229, 231 Pac. 799 (1925); Daniels v. Fossas, 152 Wash. 516, 278 Pac. 412 (1929); Elston v. King County, 178 Wash. 210, 34 P.(2d) 906 (1934).

[157] Howell v. City of Tacoma, 3 Wash. 711, 29 Pac. 447, 449 (1892) (departure from lawful procedure so serious that jurisdiction lost); State v. Superior Court, 36 Wash. 566, 79 Pac. 29 (1905); (among other grounds, unconstitutionality of statute and exemption of plaintiff's property from annexation proceedings alleged); Amos Brown's Estate v. City of West Seattle, 43 Wash. 26, 85 Pac. 854 (1906) (election void because enjoined; therefore, annexation of territory enjoined); Seattle Cedar Lumber Mfg. Co. v. City of Ballard, 50 Wash. 123, 96 Pac. 956 (1912) (proceedings under repealed statute); Seattle & Puget Sound Packing Co. v. City of Seattle, 51 Wash. 49, 97 Pac. 1093 (1908) (condemnation proceeding established that plaintiff's land was injured by improvement more than it was benefited; hence assessment was void; Bussell v. Ross, 60 Wash. 344, 111 Pac. 165 (1910) (commissioner of public lands acted in excess of statutory authority); Collins v. City of Ellensburg, 68 Wash. 212, 122 Pac. 1010 (1912) (levy void as to amount in excess of estimated cost); Elsensohn v. Garfield County, 132 Wash. 229, 231 Pac. 799 (1925) (among other grounds, failure to describe lands and to file bond alleged); Weyerhaeuser Timber Co. v. Banker, 186 Wash. 332, 58 P.(2d) 286) (1936) (plaintiff's property should not be included in flood control district because it will not be benefited).

[158] Procedural defects were held not jurisdictional in Collins v. City of Ellensburg, 68 Wash. 212, 122 Pac. 1010 (1912); Chandler v. Puyallup, 70 Wash. 632, 127 Pac. 293 (1912); Allen v. City of Bellingham, 77 Wash. 469, 137 Pac. 1016 (1914).

authority. If it may not act on its own motion, a sufficient petition by qualified persons must be presented. Notices complying with statute must be published. A serious departure from legality in the course of proceedings and determination must not occur. Generally, statutory authority must be followed in such a way as to allow persons affected full opportunity to safeguard their interests.

In the great majority of cases where injunction has issued, failure of jurisdiction has been found as a matter of law. Either the facts were undisputed or a demurrer admitted the facts well pleaded, and a purely legal question was decided. Where an administrative tribunal determines on a conflict of evidence the facts on which its jurisdiction rests, and it is authorized to do so, one might suppose that statutory appeal or certiorari would have to be employed to secure judicial review. However, some of the decisions seem to indicate that the existence of a jurisdictional fact may be challenged and tried in an action for injunction.[159] Because a presumption of regularity attaches to the proceedings of an official body, undoubtedly plaintiff has the burden of proof.

Williams Fishing Co. v. Savidge[160] is an interesting case in which a jurisdictional fact was in issue, although it was not expressly designated as such. A statute made the "shore and beach of the Pacific Ocean" between ordinary high tide and extreme low tide "from the Columbia River or Cape Disappointment on the south" to a point some twenty-five or thirty miles north a public highway "forever open to the use of the public."[161] It declared that no part of the shore or beach should be sold or leased. Plaintiff sued to enjoin the commissioner of public lands from leasing certain tide lands used by it in unloading and transporting fish. The commissioner asserted the lands were shorelands of the Columbia River and were therefore subject to lease. The pivotal question was the point at which the waters of the Columbia met the waters of the Pacific. In determining the point the commissioner had drawn a line following the "general trend of the north shore of the Columbia River" and another line "following the general trend of the Pacific Ocean." The angle formed by the two lines extended was bisected, and the intersection of the bisecting line with the Washington coast was taken as the point dividing the Pacific shoreland from the Columbia shoreland. The supreme court held that the commissioner had adopted an "incorrect view of the law" and that his method of determining the point gave widely different results depending on application. Because no evidence had been presented as to where the Columbia River actually met the Pacific Ocean, taking

[159] In particular *see* Elston v. King County, 178 Wash. 210, 34 P.(2d) 906 (1934).

[160] 155 Wash. 443, 284 Pac. 744 (1930), modifying 152 Wash. 165, 277 Pac. 459 (1929).

[161] Laws 1901, c. 110, §§ 1, 2.

into consideration accretions which may have occurred since the statute was enacted, the case was remanded for a new trial. Three judges disagreed that the commissioner had made an error of law and dissented on the ground that his determination should be conclusive unless it was "so far arbitrary as to be beyond the pale of reason, or was made under a mistaken theory of the law." The dissenting opinion went to some pains to demonstrate that no method of determining the division point between Columbia and Pacific shorelands would be exact.

The effect of the decision was to instruct the trial court to enjoin the commissioner of public lands if the evidence proved that he was attempting to lease shorelands of the Pacific. In such event a vital jurisdictional fact would be lacking, and the commissioner would have no power to act. The "jurisdictional fact doctrine" was not spoken of in the decision, and the general statement was made that where the commissioner commits an error of law or adopts a fundamentally wrong theory, a court may interfere.[162] If this statement is taken as literally true of the remedy of injunction, the equity court should become a great forum of review of administrative determinations. However, the likelihood is that such errors are cause for injunction only where the result is failure of jurisdiction, actual or constructive fraud, or grossly arbitrary action. The jurisdictional fact doctrine has not had clearcut treatment in Washington, and one cannot be sure how effective it is as a cause for injunction against administrative tribunals. The wisdom of some of its applications may be doubted where it is clear that the existence of a jurisdictional fact is a matter entrusted to the administrative body for determination.

It is to be kept in mind that wherever injunction is available because of a defect in administrative proceedings, proof must be made of threatened injury to property, irreparable in nature, for which there is no adequate relief at law. The conditions traditionally laid down by equity courts must be met. Assuming they are met, injunction is a versatile and valuable remedy in administrative law. Discretionary acts will not be controlled, but the writ will be granted to prevent fraud or arbitrary or capricious conduct. In general, injunction may not be used to review errors of law or of fact in an administrative determination. But fraud and failure of jurisdiction are grounds for relief. In tax cases, where excessive or grossly disproportionate assessment is alleged, the doctrine of constructive fraud has led to judicial review of evidence, facts, and law. One should expect the doctrine to be extended to other administrative agencies when the proper circumstances arise. Injunction is a common remedy where an administrative body is alleged to be without jurisdiction. Most of the cases involve a

[162] Citing State v. Forrest, 8 Wash. 610, 36 Pac. 686, 1120 (1894), and *id.*, 13 Wash. 268, 43 Pac. 51 (1895), both cited at note 85, *supra*.

pure question of law, but in instances it appears that the existence of a jurisdictional fact may be tried. The variety of jurisdictional cases and the doctrine of constructive fraud constitute a substantial inroad upon the proposition that errors of law or of fact may not be corrected in a suit for injunction. The proposition is generally true, but with reservations. The requirement that law procedures, such as statutory appeal, be exhausted has not been strictly adhered to, especially where lack of jurisdiction is proved.[163]

DIRECT AND COLLATERAL ATTACKS: CONCLUSION

A distinction is sometimes drawn between direct and collateral attacks upon administrative determinations. The general statement is made that in a direct attack the merits may be reviewed, while in a collateral attack plaintiff will be successful only if fraud or failure of jurisdiction is proved. The question is, in which class do the various actions fall? Roughly speaking the Washington cases have borne out that statutory appeal and certiorari provide a review of the merits, legal and factual; and that the other writs and proceedings provide relief only where arbitrary or capricious conduct, fraud, or lack of jurisdiction is proved. Thus, statutory appeal and certiorari are regarded as procedures directly attacking a judgment or administrative determination. All other procedures are regarded as collateral attacks. However, it must be said that this classification is not a hard and fast one. To the extent that a finding of fact or legal conclusion of an administrative body is subject to review, a "direct attack" is made upon it irrespective of the type of action brought.[164] Injunction has been employed to review the merits, both legal and factual, in tax cases involving constructive fraud. Possibly this has occurred as well in certain jurisdictional cases. Mandamus has issued to correct errors of law in administrative proceedings. In quo warranto it appears that election certificates and perhaps removals from office may be re-tried in court. In all these instances a "direct attack" is made, if the expression is to be understood as having reference to judicial willingness to examine into the merits of an administrative determination. Sta-

[163] Elsensohn v. Garfield County, 132 Wash. 229, 231 Pac. 799 (1925); Daniels v. Fossas, 152 Wash. 516, 278 Pac. 412 (1929). In Williams Fishing Co. v. Savidge, discussed at note 160, *supra*, no mention was made of REM. REV. STAT. § 7797-125 which apparently gave plaintiff a right to appeal to the superior court.

In Elsensohn v. Garfield County, *supra*, plaintiff sued for injunction alleging jurisdictional defects, and defendant argued that certiorari should have been sought. The court stated:

> "Shall we technically hold that one remedy being a remedy at law must be chosen and exhausted before the equitable may be invoked? Such a course would be to turn a litigant out at one door and invite him to re-enter at another, and we see no reason to sanction such a practice." (231 Pac., at p. 801)

[164] In Ruffin v. Sewell, 134 Wash. 208, 235 Pac. 31 (1925), a suit for injunction because of jurisdictional defects was termed a "direct attack."

tutory appeal and certiorari are not exclusive in providing methods for direct attack.

A summary and comparison of the remedies available in Washington to correct errors in administrative proceedings may be helpful. Where, as a matter of law, a tribunal has no jurisdiction, the defect may be urged in any of the actions or procedures discussed: appeal, certiorari, mandamus, quo warranto, prohibition, habeas corpus, or injunction. If the existence of a jurisdictional fact is challenged, appeal and certiorari are the most appropriate remedies. But injunction has provided relief in some instances, and quo warranto is probably available in certain special circumstances. In cases of detention for insanity habeas corpus is used to try a jurisdictional fact. Prohibition is ineffectual where an administrative tribunal is empowered to decide its own jurisdiction on a conflict of evidence, and the same is true of mandamus. As to the factual merits of an administrative determination, appeal or certiorari is a proper means for securing judicial review. Quo warranto is available in election contests and possibly in cases of removal from office. In tax cases involving constructive fraud the factual merits are examined into in a suit for injunction. The evidence and facts are not reviewed in mandamus, habeas corpus, or prohibition actions. The legal merits of an administrative determination are most properly subject to review in appeal or certiorari proceedings. But they have been examined into in injunction cases under the doctrine of constructive fraud and in mandamus cases involving civil service rights. In quo warranto legal questions are decided in election cases and possibly in cases of removal from office. Such questions are not reviewed in prohibition or habeas corpus.

Of all the writs and procedures statutory appeal is the most satisfactory remedy to one aggrieved by an administrative determination. Usually a trial de novo is afforded, and all questions, legal or factual, jurisdictional or on the merits, may be tried. In certiorari no trial anew is had, but the entire record is subject to review. Under statutory certiorari the superior court is authorized to reverse a finding of fact if it is unsupported by evidence or is against the preponderance of proof. Inquiry may be made into all questions, on the merits or otherwise, as in most statutory appeals. A limitation on the usefulness of certiorari and statutory appeal is that they are available only as to determinations of a judicial or quasi-judicial nature. Quo warranto is employed for a special purpose: to remedy usurpation of or intrusion into an office. The statute indicates that all questions may be tried, and this has certainly been true in election cases. The general rule is that neither injunction nor mandamus is available to correct errors of law or of fact in an administrative determination. However, injunction is available to give relief from fraud, arbitrary or capricious conduct,

or proceedings void for want of jurisdiction. The constructive fraud doctrine has resulted in extensive review of the facts and law entering into the merits of a tax determination. To a less extent, the same may be said of the jurisdictional fact doctrine. Mandamus ordinarily issues only where an official is under a statutory or constitutional duty to do a particular act and has no discretion or power of adjudication. But in civil service cases it appears that mandamus may sometimes issue to correct an error of law in an administrative determination. Thus, injunction and mandamus encroach upon the functions of statutory appeal and certiorari. Habeas corpus provides a remedy for detention under a void proceeding but does not usually afford review on the merits. Under prohibition the basis for relief is very narrow. Only if a tribunal has no jurisdiction as a matter of law will the writ issue. The merits will not be inquired into, nor will the evidence supporting a finding of jurisdictional fact. Mandamus, injunction, habeas corpus, quo warranto and prohibition (statutory) may be granted against officers and tribunals exercising either judicial or non-judicial powers. In passing, the observation may be made that the extent of review depends in some measure on the character of the tribunal and of the interests involved. This fact sometimes causes difficulty in ascertaining what is the normal scope of inquiry under a writ.

Differences exist among the extraordinary writs as to the time when they may be instituted, as to procedural and substantive requirements, as to the extent of judicial review, and as to the specific remedy which will be applied. No doubt lawyers have made errors in choosing the appropriate proceeding, and the thought may occur that the writs should be simplified and unified. Perhaps a single writ to review administrative action would accomplish this. If the facts alleged and proved constitute a cause of action, the relief requested should be granted if it fits the occasion and the time is proper. The need for reform is probably not pressing because the functions of the various writs and proceedings are fairly clear. The Washington court has been reasonably liberal in granting proper relief where the proof warranted it, and in fitting the remedy sought to the facts at hand.

The conclusion must be that there are ample procedures in Washington to secure judicial review of administrative acts and determinations. Illustrations of all types of administrative abuse and error may be found in the decisions and judicial relief of one sort or another is invariably available. For the main part, the Washington Supreme Court has recognized that administrative processes, to be effective, must not be hampered at every step and for any reason by judicial intervention. But the court has been on the liberal side in permitting use of the extraordinary writs and procedures where good cause appears.